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Mohd Faisa bin Ismail v Public Prosecutor

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HIGH COURT (BUTTERWORTH) — CRIMINAL APPEAL NO PA-42S-5–07 OF 2020
AMIRUDIN RAHMAN JC
31 MARCH 2021

C

Criminal Law — Corrosive and Explosive Substances and Offensive Weapons Act 1958 — Section 6 — Possession of knife — Whether weapon was offensive weapon — Possession of offensive weapon in public place — Whether there was burden for prosecution to disprove fact that accused had lawful authority — Whether accused had in his possession or under his control weapon — Whether SCJ correct to invoke judicial notice — Whether offensive weapon was limited to the Second Schedule of the Corrosive and Explosive Substances and Offensive Weapons Act 1958

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Criminal Procedure — Appeal — Sentence — Accused found guilty for being possession of the offensive weapon — Whether accused had in his possession or under his control offensive weapon — Whether possession of offensive weapon at public road or area — Whether accused to be acquitted and discharged from sentence — Corrosive and Explosive Substances and Offensive Weapons Act 1958

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This was the appellant's appeal against his conviction and sentence. The appellant was charged for the possession of an offensive weapon without lawful authority in a public place pursuant to s 6(1) of the Corrosive and Explosive Substance and Offensive Weapons Act 1958 ('the Act'). The appellant claimed trial to the charge and at the end of the defence case the sessions court judge ('SCJ') ruled that the prosecution had proven a case beyond a reasonable doubt and convicted the appellant and sentenced him to imprisonment of six years and one stroke of whipping. The facts of the case were that SP1 received information that there was an unidentified man who entered a house. SP1 accompanied by two police officers went to the said house and SP1 saw a man who was identified as the appellant leaving the said house and SP1 and his team chased the appellant and he was later apprehended at the back of the house over the fence of the house. A body search conducted by SP1 found a sling bag in which a 17cm knife was found among other items. SP1 then apprehended the appellant and seized all the items and the appellant was brought to the police station where SP1 lodged a police report and proceeded to inform SP2 who was the investigating officer assigned to the case and handed over the appellant and the items seized. SP1 prepared a form detailing the items handed over to SP2. SP2 in cross-examination confirmed that she was also the investigating officer

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of the house breaking case where the appellant was previously charged pursuant to s 457 of the Penal Code for committing housebreaking on the same occasion. During the defence case, the appellant gave sworn evidence and testified that he had indeed committed housebreaking at the said house and that he was not first apprehended by SP1 or any other police officer but was in fact apprehended by members of the public. It was only later that the police arrived and arrested him. The defence called SD2 the house owner to testify and SD2 stated that she had logged a report concerning the housebreaking incident. SD2 further testified that she did not see the arrest of the appellant as she remained inside the house and that the police had later came to the house to investigate. SD2 was never asked to identify the appellant. The matters to be determined were: (a) whether the weapon was an offensive weapon by virtue of s 2 of the Act; (b) whether the accused had in his possession or under his control an offensive weapon; and (c) whether the possession or control of the offensive weapon was that at a public road or public place.

Held, allowing the appeal and setting aside the conviction and sentence:

(1) There was no burden for the prosecution, in relation to the offence which the appellant was charged with the disprove that the accused had lawful authority of lawful purpose in regards to the possession or control of the said offensive weapon as the onus was on the accused and not the prosecution to prove as such (see para 18).

(2) The offensive weapon involved was a knife measuring around 17cm. The court was satisfied that this element was proven as it would be logical to conclude that a knife if used as a weapon of offence was likely to cause hurt. Further, offences pursuant to s 6(1) of the Act 357 are not subjected to the Second Schedule of Act 357. It was a fallacy to conclude that 'offensive weapons' are bound by the Second Schedule of Act 357. The Second Schedule relates distinctly to offences pursuant to sub-s 7(1) of Act 357 which are offences in regards to scheduled weapons. However, it was sound to say that all 'scheduled weapons' as listed in the Second Schedule of Act 357 are undoubtedly 'offensive weapons' (see paras 22–25).

(3) There were multiple inconsistencies in relation to SP1's evidence. Matters of credibility of the witness was commonly left to the trial judge to the determine and the appellate courts should be slow to interfere with findings of fact made by a trial court. The court was of the view that SP1 who was inconsistent in his testimony during trial shed doubt on the veracity of the events which took place. The inconsistency in which where the sling bag containing the knife was found was not trivial in nature and goes to the root of the entire case of the prosecution. When a witness shows inconsistencies in his evidence and keeps altering the version of events while testifying, the testimony must be scrutinized with

great care and caution. A witness could not without plausible reason or justification make amends to his earlier testimony as he wishes. Being doubtful of the fact upon viewing the testimony of SP1 the court was of the opinion that the prosecution had failed to prove the element of possession (see paras 31, 34, 37–38 & 41–42).

(4) The photographs taken does not include the place where the appellant was said to be in possession of the knife nor was there any sketch plan tendered. It was wrong for the SCJ to invoke judicial notice with regard to the fact that the place where the appellant was apprehended and the said knife was discovered was a public place. Judicial notice on surroundings should only be taken which are of general in nature and which would be in the common knowledge of any ordinary person. The trial court should not import evidence that the place was indeed a public place when it was not stated nor explained in the course of the trial. It was too farfetched to state that what was behind the house was a public place as it was something particular in nature and would not be in the common knowledge of any person ordinary person. The evidence of the witness only said that the arrest was made at the back of the house. The prosecution left an unanswered question as to whether the appellant was found in a public place with the offensive weapon and the court was left guessing. Leaving the matter unexplained does not allow the court to unjustly assume that it was indeed a public place as the offence could only be constituted if it was found in a public place (see paras 45, 55–56 & 59–62).

[Bahasa Malaysia summary

Ini merupakan rayuan perayu terhadap sabitan dan hukumannya. Perayu telah dituduh kerana memiliki satu senjata merbahaya tanpa kuasa sah di tempat awam selaras dengan s 6(1) Akta Bahan-Bahan Kakisan dan Letupan dan Senjata Berbahaya 1958 ('Akta tersebut'). Perayu kemudiannya memohon untuk dibicarakan atas pertuduhan tersebut dan di akhir kes pembelaan, hakim mahkamah sesyen ('HMS') telah memutuskan bahawa pendakwaan telah membuktikan satu kes melampaui keraguan munasabah dan mensabitkan perayu dan menghukumnya kepada pemenjaraan selama enam tahun dan satu sebatan. Fakta kes adakah bahawa SP1 telah menerima maklumat bahawa wujud seorang lelaki yang tidak dikenal pasti telah memasuki satu rumah. SP1 bersama-sama dengan dua orang pegawai polis pergi ke rumah tersebut dan SP1 melihat seorang lelaki yang dicamkan sebagai perayu meninggalkan rumah tersebut dan SP1 dan pasukannya mengejar perayu dan dia kemudiannya ditahan di belakang rumah selepas pagar rumah tersebut. Satu pemeriksaan badan yang dijalankan oleh SP1 mendapati satu beg galas yang mana satu pisau 17cm ditemui antara barang lain. SP1 kemudiannya menahan perayu dan merampas semua barang tersebut dan perayu telah dibawa ke balai polis yang mana SP1 telah membuat laporan polis

dan kemudiannya memaklumkan SP2 yang merupakan pegawai penyiasat yang ditugaskan kepada kes tersebut dan menyerahkan perayu dan semua barangan yang dirampas. SP2 semasa pemeriksaan balas turut mengesahkan bahawa dia merupakan pegawai penyiasat kes pecah rumah yang mana perayu telah dituduh sebelum ini selaras dengan s 457 Kanun Keseksaan kerana telah melakukan pecah rumah pada waktu yang sama. Sewaktu kes pembelaan, perayu memberi keterangan bersumpah bahawa dia telah melakukan pecah rumah pada waktu yang sama di rumah tersebut dan dia tidak pada mulanya ditahan oleh SP1 atau mana-mana pegawai polis yang lain, tetapi dia sebenarnya ditahan oleh orang awam. Hanya kemudian pihak polis tiba dan menahannya. Pembelaan memanggil SD2, pemilik rumah tersebut dan dia menyatakan bahawa dia telah membuat satu laporan mengenai kejadian pecah rumah tersebut. SD2 turut memberi keterangan bahawa dia tidak melihat tangkapan perayu dan dia kekal berada di dalam rumah tersebut dan polis telah kemudiannya hadir ke rumah tersebut untuk menyiasat. SD2 tidak pernah di minta untuk mengecam perayu. Perkara untuk ditentukan adalah: (a) sama ada senjata merupakan berbahaya selaras dengan s 2 Akta tersebut; (b) sama ada tertuduh mempunyai dalam milikannya atau kawalannya satu senjata berbahaya; dan (c) sama ada milikan atau kawalan senjata berbahaya tersebut adalah di jalan atau tempat awam.

Diputuskan, membenarkan rayuan dan mengetepikan sabitan dan hukuman:

(1) Tiada beban untuk pendakwaan, berhubung dengan kesalahan yang perayu didakwa dengan tidak meluluskan bahawa tertuduh mempunyai kuasa sah disisi undang-undang berkaitan dengan pemilikan atau kawalan senjata berbahaya tersebut kerana beban merupakan pada pendakwaan untuk membuktikan sedemikian (lihat perenggan 18).

(2) Senjata berbahaya yang berkaitan adalah pisau berukuran lebih kurang 17cm. Mahkamah berpuas hati bahawa elemen ini telah dibuktikan kerana ianya masuk akal untuk membuat kesimpulan bahawa satu pisau, sekiranya ianya digunakan sebagai senjata untuk satu kesalahan dan berkebarangkalian akan menyebabkan kecederaan. Lanjutan itu, kesalahan selaras dengan s 6(1) Akta 357 tidak tertakluk kepada Jadual Kedua Akta 357. Adalah merupakan satu kesilapan untuk membuat kesimpulan bahawa 'senjata berbahaya' adalah terikat kepada Jadual Kedua Akta 357. Jadual Kedua berkaitan dengan kesalahan selaras dengan s 7(1) Akta 357 yang merupakan kesalahan berkaitan dengan senjata berjadual. Namun ianya adalah tepat untuk menyatakan bahawa semua senjata berjadual yang disenaraikan di bawah Jadual Kedua Akta 357 merupakan senjata berbahaya (lihat perenggan 22–25).

(3) Wujud beberapa percanggahan berkaitan dengan keterangan SP1. Perkara berkaitan dengan kebolehpercayaan saksi secara amnya ditinggalkan kepada mahkamah bicara untuk menentukan dan

mahkamah yang mendengar rayuan sepatutunya perlahan untuk campur tangan dengan dapatan fakta yang dibuat oleh mahkamah bicara. Mahkamah berpandangan bahawa SP1 yang tidak konsisten dalam keterangannya sewaktu perbicaraan menimbulkan keraguan berkaitan dengan apa yang berlaku sewaktu kejadian tersebut. Percanggahan berkaitan di mana beg galas yang mengandungi pisau tersebut ditemui tidaklah remeh dan pergi kepada asas keseluruhan kes pendakwaan. Apabila seorang saksi menunjukkan percanggahan dalam keterangannya dan asyik mengubah versi kejadian semasa memberi keterangan, keterangannya mesti diteliti dengan berhati-hati. Seorang saksi tidak boleh tanpa sebab atau justifikasi membuat pindaan kepada keterangan awalnya sesuka hati. Atas sebab wujud keraguan di atas fakta tersebut setelah meneliti keterangan SP1 mahkamah berpendapat bahawa pendakwaan gagal untuk membuktikan elemen milikan (lihat perenggan 31, 34, 37–38 & 41–42).

(4) Gambar yang diambil tidak melibatkan tempat di mana perayu dikatakan mempunyai milikan pisau tersebut dan tidak juga ada apa-apa rajah kasar dikemukakan. Ianya adalah salah untuk HMS menggunakan notis kehakiman berkaitan dengan fakta bahawa tempat di mana perayu di tahan dan pisau tersebut ditemui di tempat awam. Notis kehakiman berkaitan dengan persekitaran hanya boleh dibuat apabila ianya bersifat umum dan merupakan pengetahuan umum orang biasa. Mahkamah bicara tidak sepatutnya mengimport keterangan bahawa tempat tersebut merupakan tempat awam apabila ianya tidak dinyatakan atau diterangkan dalam proses perbicaraan. Ianya adalah terlalu jauh untuk menyatakan bahawa apa yang merupakan dibelakang rumah merupakan tempat awam kerana ianya merupakan satu perkara yang terperinci dan tidak akan berada di dalam pengetahuan umum orang biasa. Keterangan saksi hanya menyatakan bahawa tangkapan tersebut dilakukan di belakang rumah tersebut. Pendakwaan telah meninggal satu persoalan yang tidak berjawab berkaitan sama ada perayu ditemui di tempat awam dengan senjata berbahaya tersebut dan mahkamah dibiarkan meneka. Meninggalkan perkara tersebut tanpa dijelaskan tidak membenarkan mahkamah untuk secara tidak adil membuat andaian bahawa ianya sememangnya tempat awam kerana kesalahan tersebut hanya boleh berlaku sekiranya ianya ditemui ditempat awam (lihat perenggan 45, 55–56 & 59–62).]

Cases referred to

Bhojraj v Sita Ram & Ors AIR 1936 PC 60 (refd)
Chan Pean Leon v PP [1956] 1 MLJ 237; [1956] 1 LNS 17 (refd)
Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377 (refd)
Commonwealth Shipping Representative v Peninsular and Oriental Branch Service [1923] AC 191, HL (refd)

Gunalan a/l Ramachandran & Ors v PP [2006] 2 MLJ 197; [2006] 1 CLJ 857, FC (refd)
Holland v Jones [1917] HCA 26 (refd)
Khoon Chye Hin v PP [1961] 1 MLJ 105b; [1961] 1 LNS 41, CA (refd)
Kordial Kor d/o Kundang Singh v EC Controlled Demolition Sdn Bhd & Ors [2002] 7 MLJ 386, HC (refd)
Lai Kim Hon & Ors v PP [1981] 1 MLJ 84, FC (refd)
Lim Kong v PP [1962] 1 MLJ 195; [1962] 1 LNS 89 (folld)
Muniandy & Ors v PP [1966] 1 MLJ 257; [1966] 1 LNS 110, FC (refd)
PP v Mohamed Ali [1962] 1 MLJ 257 (refd)
PP v Sundaravelu [1967] 1 MLJ 79 (refd)
PP v Vijaya Raj [1981] 1 MLJ 43; [1980] 1 LNS 188 (refd)
Tenaga Nasional Bhd v Teobros Development Sdn Bhd [2008] 6 MLJ 391; [2008] 1 LNS 395, CA (refd)

Legislation referred to

Corrosive and Explosive Substances and Offensive Weapons Act 1958 ss 2, 6, 6(1), (2), 7(1), Second Schedule
Evidence Act 1950 ss 56, 114
Penal Code s 457

Anbananthan a/l Yathiraju (Anba & Assoc) for the appelant.
Muhamad Syeqal bin Che Murat (Deputy Public Prosecutor, Penang State Legal Advisor's Office) for the respondent.

Amirudin Rahman JC:

INTRODUCTION

[1] The appellant (Mohd Faisa bin Ismail) was charged in the Butterworth Sessions Court for the possession of an offensive weapon without lawful authority in a public place pursuant to s 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Act 1958 ('Act 357').

[2] The charge against the appellant reads as follows:

> *Pertuduhan*
>
> Bahawa kamu pada 02hb April 2019 jam lebih kurang 11.30 pagi, di alamat belakang rumah No 120, Jalan Bagan Lallang 1, Taman Bagan Lalang, Butterworth, di dalam Daerah Seberang Perai Utara, di dalam negeri Pulau Pinang, telah didapati memiliki sejanta berbahaya di tempat awam iaitu satu bilah pisau berukuran lebih kurang 17cm, tanpa kebenaran yang sah, oleh yang demikian kamu telah melakukan satu kesalahan di bawah seksyen 6(1) Akta Bahan Kakisan dan Letupan dan Senjata Berbahaya 1958 dan boleh dihukum di bawah peruntukan yang sama.

[3] The appellant had claimed trial to the charge and tried before the

Butterworth Sessions Court. The prosecution had elected to call two witnesses during the prosecution's case and at the close of the prosecution's case, the sessions court judge ('SCJ') ruled that the prosecution had made out a prima facie case against the appellant (accused) and called upon the appellant to enter his defence. During the defence's case, the appellant had given sworn evidence as well as another witness, which was the owner of house in a related housebreaking case in which the appellant was previously charged with and convicted.

[4] At the end of the defence's case, the learned SCJ decided that the prosecution had managed to prove their case beyond reasonable doubt and convicted the appellant as per the charge against him. The appellant was then sentenced to imprisonment for six years from date of arrest and one stroke of whipping.

[5] Dissatisfied with the decision of the learned SCJ, the appellant appealed to this court against both the conviction and the sentence. There was no cross appeal by the prosecution in regards to sentence imposed upon the appellant.

FACT OF THE CASE

[6] The facts of this case made out by the prosecution is that on the 2nd of April 2019 at about 11.45am, Sarjan Azizan bin Kadir ('SP1') received information from the Northern Seberang Perai Police District Headquarters that there was an unidentified man who had entered a house located at No 120, Jalan Bagan Lalang 1, Taman Bagan Lalang, Butterworth, Pulau Pinang.

[7] SP1 accompanied by another two police officers, went to the said address and upon arrival, SP1 saw a man, who was later identified as the appellant leaving the said house and the appellant was heading towards the back of the house. SP1 and his team chased the appellant and managed to apprehend the appellant somewhere at the back of the house which was over the fence of the said house.

[8] SP1 then conducted a body search on the appellant and found a sling bag with the word 'Nike', worn by the appellant. SP1 proceeded to examine the contents of the bag and found a wallet, a black tablet computer, a sim card, a receipt, a screwdriver set and a 17cm knife with the words 'Victorinox Swizerlano' written on it.

[9] Subsequently, SP1 arrested the appellant and seized the above mentioned items. The appellant was then brought to the police station where SP1 lodged a police report (Seri Pinang Report: 478/19) and prepared a search list. SP1 then proceeded to inform Insp Nurul Hafizah Rusland ('SP2') who

A was the investigating officer assigned to the case. The appellant along with the items seized and the search list, was handed over to SP2. SP1 had then prepared a form detailing the items handed over by SP1 to SP2.

B **[10]** According to SP2, who is an investigating officer from the Criminal Investigation Department at the Northern Seberang Perai Police District Headquarters, she had first received a police report (Seri Pinang Report: 473/19) lodged by SD2 on 2 April 2019 regarding a housebreaking incident that occurred at SD2's house located at No 120, Jalan Bagan Lalang 1, Taman Bagan Lalang, Butterworth, Pulau Pinang (the said house). At this C point of time, she was not aware of SP1's report or regarding the arrest of the appellant.

[11] SP2 then went to the said location at around 12 noon on the same day, D along with a police photographer to investigate on the housebreaking case that was reported by the house owner ('SD2'). At the location, SP2 instructed the police photographer to take photos of the house and four photos were taken (which was marked during the trial as P1 A-D).

E **[12]** Only at about 4.55pm, SP2 had received information from SP1 on the appellant's arrest by SP1. SP2 confirmed the fact that she had received the items seized amongst others which included the sling bag and the knife as well as the SP1's police report and search list.

F **[13]** SP2 in cross examination had confirmed to the proposition by defence that she was also the investigating officer of the housebreaking case, where the appellant was previously charged with pursuant to s 457 of the Penal Code for committing housebreaking on the same occasion which involved SD2's house. SP2 stated that the appellant had pleaded guilty to the charge and was G sentenced with imprisonment, for a term which she was unsure of.

[14] During the defence's case, the appellant gave sworn evidence and testified that he had indeed committed housebreaking at the said house. However, he contended the fact that he was not first apprehended by SP1 or H any other police officer and stated that he was instead apprehended by members of the public. It was only later that the police arrived and arrested him. The appellant has also denied the version put forward by the prosecution that the sling bag containing the knife was worn by him at the time of arrest.

I **[15]** The defence elected to call the house owner ('SD2') to testify. SD2 stated in her evidence that she had lodged a police report somewhere in April 2019 which was identified as Seri Pinang Report: 473/19 on a housebreaking incident. According to SD2, the perpetrator had entered her house vide the ceiling in the bathroom which SD2 found to be broken by the perpetrator at

the time of the incident. SD2 also testified that she did not see the arrest of the appellant as she remained inside the house. SD2 also said that the police had later came into her house to investigate, which lasted less than half an hour. SD2 was never asked by neither the defence nor the prosecution to identify the appellant.

CHARGES PURSUANT TO S 6(1) OF ACT 357

[16] Section 6 of Act 357 reads:

> 6 *Carrying offensive weapons in public places*
>
> (1) *Any person who in any public road or place carries or has in his possession or under his control any offensive weapon* otherwise than with lawful authority or for a lawful purpose shall be guilty of an offence and on conviction be liable to imprisonment for a term of not less than five years and not more than ten years, and to whipping.
>
> (2) In any prosecution for an offence under subsection (1) the onus of proving the existence of a lawful purpose shall lie upon the accused.
>
> (3) A weapon shall be presumed to be carried with lawful authority if it is carried:
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> (a) by a member of the armed forces of Malaysia or of any local force or of the police force or of any visiting force lawfully present in Malaysia under any Jaw relating to visiting forces, or a person in the service of any Government or local authority in Malaysia, and in any such case is carried in or in connection with the performance of his duty as such member or person; or
>
> (b) by any person as part of his official or ceremonial dress on any official or ceremonial occasion.
>
> (4) An offence under subsection (1) shall be deemed to be a seizable and non-bailable offence. (Emphasis added.)

[17] The charges preferred by the prosecution against the appellant was that of being in possession of a knife measuring 17cm in a public place: The elements that must be proven for a charge pertaining to s 6(1) of Act 357 are:

(a) the weapon is an offensive weapon by virtue of s 2 of Act 357;

(b) the accused had in his possession or under his control the offensive weapon; and

(c) the possession or control of the offensive weapon is that at a public road or public place.

[18] There is no burden for the prosecution, in charges relating to this provision to disprove that an accused had lawful authority or lawful purpose in regards to the possession or control of the said offensive weapon as the onus is on the accused and not the prosecution to prove as such, by virtue of s 6(2) of Act 357.

This matter was discussed thoroughly in *Public Prosecutor v Sundaravelu* [1967] 1 MLJ 79, where it was held:

> ... On those facts the respondent was charged 'with possession of an offensive weapon in a public place otherwise than for a lawful purpose' under s 6(1) of the Corrosive and Explosive Substances and Offensive Weapons Ordinance 1958. The learned magistrate acquitted him without his defence being called; he based his decision on three grounds. Firstly, he was of the view that the knife was an ordinary kitchen knife obtainable in most shops selling kitchenware and consequently was not an offensive weapon. I disagree with him. In view of its size and shape the knife was undoubtedly a lethal weapon and, if so minded as a weapon of offence was likely to cause hurt. Secondly, the learned magistrate was of the view that the presumption under sub-s (2) of the section should not be invoked in order to supplement a lacuna in the prosecution case on the ground that the case was not fully investigated. In my opinion the learned magistrate took a wrong view of the law. *What the prosecution had to prove was to establish a prima facie case in the sense of adducing evidence that the respondent was in possession of an offensive weapon in a public place.* It is not essential for the prosecution to prove the absence of lawful purpose. The onus of negativing the averment was for the defence to prove that he had a lawful purpose to possess the knife. Lawful purpose must here be used in the sense of purpose supported by law and to avail as a defence must relate to the actual time the weapon was found in the respondent's possession. An analogy can be drawn from the many decisions under the Emergency Regulations, 1951, notably the Court of Appeal case of *Abdul Manap v Public Prosecutor* [1952] 1 MLJ 140. Thirdly, the learned magistrate took the view that no dangerous situation existed at the time of the arrest and therefore came to the conclusion that there was reasonable doubt as to whether the respondent kept the knife for an unlawful purpose. That, to my mind, was a finding of fact based on speculation since the respondent had not given evidence to explain his purpose for possessing the knife. (Emphasis added.)

[19] Therefore, this court shall not dwell on matters of lawful authority or lawful purpose as the position of the law is very much unambiguous and certain. Be that as it may, this defence does not relate to the case at hand as no such defence was put suggested or put forward.

The weapon is an offensive weapon by virtue of s 2 of Act 357

[20] The first element which must be proven by the prosecution in this case is that the weapon that was in the possession of the appellant was an offensive weapon as defined pursuant to s 2 of Act 357.

[21] Section 2 of Act 357 defines 'offensive weapon' as follows:

> 2 *Interpretation*
>
> In this Act, unless the context otherwise requires —
>
> ...
>
> 'offensive weapon' includes any instrument which if used as a weapon of offence is likely to cause hurt;

[22] In this appeal before this court, the offensive weapon involved is a knife measuring around 17cm. This court is satisfied that this element is proven as it would be logical to conclude that a knife if used as a weapon of offence is likely to cause hurt. Furthermore, the said knife was recovered by the police and tendered as well as marked as exh P6, during the trial before the SCJ. The knife in question was viewed by the trial court and parties during the trial and was identified by the related witnesses. Thus, there is no reasonable argument or notion that can be made surrounding this element.

[23] Despite this, for matters of comprehensiveness, this court wishes to make it explicit that offences pursuant to s 6(1) of Act 357 are not subjected to the Second Schedule of Act 357. The sessions court had considered the Second Schedule when deciding on the case, where it was reflected in the grounds of judgment by the learned SCJ:

> [16] Dalam kes ini, sebilah pisau yang berukuran 17cm dengan perkataan Victorinox (Switzerlano) *adalah senjata berbahaya* seperti yang *telah disenaraikan di bawah Jadual Kedua* Akta tersebut.

[24] It is a fallacy to conclude that 'offensive weapons' are bound by the Second Schedule of Act 357. The Second Schedule relates distinctly to offences pursuant to sub-s 7(1) of Act 357 which are offences in regards to scheduled weapons. The definition of 'scheduled weapon' is also stated under s 2 Act 357 where it is classified as follows:

> 2 *Interpretation*
>
> In this Act, unless the context otherwise requires:
>
> ...
>
> 'scheduled weapon' means any offensive weapon specified in the Second Schedule.

[25] However, it is sound to say that all 'scheduled weapons' as listed in the Second Schedule of Act 357 are undoubtedly 'offensive weapons' due to the very reason that the 'scheduled weapons' listed *if used as a weapon of offence is likely to cause hurt* (referring to the definition of offensive weapons) as logic would dictate. But vice versa, not all 'offensive weapons' are listed in the Second Schedule making it a 'scheduled weapon'. Therefore, the learned SCJ had

misdirected herself in concluding that the 'offensive weapons' are bound by the Second Schedule of Act 357. This misdirection however in no circumstances has prejudiced the appellant in this case.

[26] To put this matter to rest, 'offensive weapons' are not bound by the Second Schedule of Act 357 connotating that the prosecution does not have to show that the 'offensive weapon' that was in the possession or under the control of an accused was listed under the Second Schedule.

The accused had in his possession or under his control an offensive weapon

[27] The sole prosecution witness who was present during the incident which testified during the trial, was SP1. SP1 in his witness statement and during examination-in-chief gave evidence that upon arriving at the scene, he saw a man whom he later identified as the appellant running out of the said house towards the area behind the house. SP1 stated that he and his team gave chase to the appellant and manged to apprehend the appellant behind the said house. SP1 examined the appellant and found a sling bag with the words 'Nike' worn by the appellant and upon examining the contents of the sling bag, the said knife was found.

[28] However, during cross-examination by the defence, SP1 had given a different version of events which took place. He had agreed with the defence that the sling bag which contained the knife was instead recovered from the roof of the house and not worn by the appellant at the time he was apprehended. The relevant portion during cross-examination in the notes of evidence is reproduced as below:

> Q: *Beg Nike bukan dirampas daripada OKT tetapi diambil dari atas bumbung tempat di kejadian dari mana OKT telah masuk dalam rumah, betul*?
>
> A: *Betul*.
>
> Q: *Maksudnya beg Nike dan barang-barang yang terkandung dalam ini, betul*?
>
> A: *Betul*.
>
> Q: *OKT telah memaklumkan di mana beg itu berada dan menyebabkan pihak polis ambil beg itu dari dari bumbung atas kerjasama OKT, betul*?
>
> A: *Betul.*
>
> Q: Keterangan bersumpah tadi, setuju beg tersebut telah diambil dari bumbung.
>
> A: Saya confuse.
>
> Q: Soalan dalam Bahasa Melayu kan, saya guna Bahasa yang mudah difahami. Betul?
>
> A: Betul. (Emphasis added.)

[29] The prosecution during re-examination had attempted to clarify this matter and SP1 had changed his answer again and said that the sling bag was worn by the appellant at the time he was apprehended by SP1 and his team. In his re-examination he stated:

> Q: Tadi peguam ada bagitahu setuju tak OKT telah bagitahu kepada polis semasa kamu tangkap ya, dia bagitahu beg ini diambil dari bumbung?
>
> A: Tidak setuju.
>
> Q: Tadi kamu setuju, kenapa kamu setuju?
>
> A: Tadi saya setuju sebab saya dah confuse. Ini kali pertama saya masuk dalam proceeding Mahkamah, jadi saya confuse sikit. Bila tanya balik kali ke-2 saya ingat balik memang beg itu digalas oleh OKT.
>
> ...
>
> Q: Dan tadi juga kamu setuju dengan peguam, soalan yang dia tanya itu Bahasa Malaysia yang sangat simple dan kamu tidak perlu keliru. So boleh jelaskan kenapa tadi masa peguam tanya kamu setuju dan sekarang kamu tidak setuju?
>
> A: Tadi perasaan saya gemuruh dan setelah soalan keluar daripada Puan DPP, saya terus stabil dan ingat balik apa yang berlaku.

[30] This court is very much aware of the decision in *Public Prosecutor v Mohamed Ali* [1962] 1 MLJ 257 which ruled that testimonies by police witnesses should be accepted in the first instance and is very much in agreement to this principle. However, Thomson J had made it explicit in His Lordship's judgment that a trial court must nevertheless consider whether or not the testimony should be accepted if it is contradicted by other evidence or is shaken by cross-examination. The judgment stated:

> *When a police witness says something that is not inherently improbable his evidence must in the first instance be accepted.* If he says he saw a cow jumping over the moon his evidence is, of course, not to be accepted, but if he says he saw a cow wandering along one of the main streets of Kuala Lumpur (the sort of thing we all see every day of our lives) there is not the slightest justification for refusing to believe him. *Of course, if his evidence is contradicted by other evidence or is shaken by cross-examination then it becomes the business of the magistrate to decide whether or not it should be accepted. In the absence of contradiction, however, and in the absence of any element of inherent probability the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted.* (Emphasis added.)

[31] Apart from SP1's testimony regarding the recovery of the said knife, this court also found multiple inconsistencies in SP1's evidence upon perusal of the records of appeal. First and foremost, in regards to SP1's arrival at the scene and the time the appellant was arrested. SP1 was inconsistent in his testimony regarding this matter. He stated in his police report which was marked as exh P9 during the trial that he had received information on the incident at

around 11.30am. On the other hand, in his witness statement he stated that he had received the information at 11.45am During cross-examination by the defence he contradicted himself by stating that the arrest was conducted at 11.30am and had arrived at the said house at 11.15am. SP1 further stated at this point that it took him 15 minutes to arrive at the said house after he had received the information on the incident which would put the time that he received the information at about 11am.

[32] Another inconsistency regarding SP1's testimony is that in his witness statement he had stated that he saw the appellant leaving the said house. The related portion is reproduced in verbatim as below:

> 5. Setelah menerima maklumat tersebut, saya bersama anggota terus bergegas ke alamat tersebut. Semasa saya bersama anggota sampai di tersebut, *saya lihat ada (1) lelaki bangsa tidak pasti keluar dari rumah tersebut* dan berlari ke arah belakang rumah. Saya dan anggota terus mengejar lelaki tersebut dan Berjaya menangkapnya di belakang rumah. (Emphasis added.)

[33] During cross-examination SP1 again contradicted his earlier version of events which took place. When asked by the defence on what he saw when he arrived at the scene, SP1 testified that he did not see the appellant leaving the said house as he headed straight to the back of the said house. The related part of the notes of evidence during the cross-examination of SP1 is reproduced:

> Q: Masa sampai di tempat kejadian, kamu nampa OKT keluar dari rumah?
>
> A: Saya tak Nampak. Saya terus ke belakang rumah selepas saya terima arahan dari Gerakan SPU.
>
> Q: Bila kamu ke belakang rumah, kamu nampak OKT telah keluar dari rumah, betul?
>
> A: Saya tak nampak dia keluar dari rumah, Cuma dia sedang berlari di belakang.
>
> Q: Saya rujuk pernyataan saksi kamu di perenggan 5, kamu ada sebut kamu lihat ada satu lelaki bangsa tidak pasti telah keluar dari rumah tersebut dan berlari ke arah belakang rumah, betul?
>
> A: Betul.
>
> Q: So kalau begitu, apabila kali pertama kamu lihat dia keluar daripada rumahlah?
>
> A: Ya.

[34] Matters of credibility of witnesses is commonly left to the trial judge to determine and appellate courts should be slow to interfere with findings of fact made by a trial court. In *Public Prosecutor v Vijaya Raj* [1981] 1 MLJ 43; [1980] 1 LNS 188, Wan Yahya J had recapped this principle, where His Lordship ruled:

> It has been submitted far too frequently in this court that in my appellate jurisdiction I should not interfere with the findings of facts by the courl below. It is true that appellate courls are usually slow in disturbing findings of facts made by the trial judge, *but I can find no rule which restricts my function here only to that of a judge of law and not of facts. It is the duty of the court on appeal to review all evidence presented before the lower court and, if it feels that certain material facts have been missed or improperly considered by the presiding President or magistrate, then it should not hesitate from performing its duty as a judge of facts to consider and weigh those facts and decide whether those facts could have altered their judgment in one way or another.* (Emphasis added.)

[35] In *Lai Kim Hon & Ors v Public Prosecutor* [1981] 1 MLJ 84 the Federal Court grounds of judgment stated:

> The principle of law governing appeals in criminal cases on questions of fact is well established, in that the *appeal court will not interfere unless the balance of evidence is grossly against the conviction especially upon a finding of a specific fact involving the evaluation of the evidence of a witness founded on the credibility of such witness.* (Emphasis added.)

[36] A court hearing an appeal is therefore not prohibited from considering and evaluating evidence of a witness founded on the credibility. A court hearing an appeal must also always appraise the evidence of a witness when issues surrounding credibility arises in an appeal. The Federal Court's case of *Muniandy & Ors v Public Prosecutor* [1966] 1 MLJ 257; [1966] 1 LNS 110 held:

> We appreciate that this court should not lightly differ from the views of the trial judge since he had the advantage of seeing and hearing the witnesses whose demeanour he was able to study in order to form his opinion as to their credibility. However, in cerlain circumstances, it would be right and proper to do so. As was said by Lord Greene MR in *Yuill v Yuill* [1945] P 15, 19.
>
> > We were reminded of cerlain well known observations in the House of Lords dealing with the position of an appellate court when the judgment of the trial judge has been based in whole or in pari on his opinion of the demeanour of witnesses. It can, of course, only be on the rarest occasions, and in circumstances where the appellate court is convinced by the plainest considerations, that it would be justified in finding that the trial judge had formed a wrong opinion. But when the court is so convinced it is, in my opinion, entitled and indeed bound to give effect to its conviction. It has never been laid down by the House of Lords that an appellate court has no power to take this course. Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be deceived by a clever liar, or led to form an unfavourable opinion of an honest witness, and may express his view that his demeanour was excellent or bad as the em may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an

> impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value.
>
> In the instant case, it is stated by the learned trial judge as the ground for his belief in the main prosecution witnesses, that they had been unshaken in cross-examination. In our view, being unshaken in cross-examination is not per se an all sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration. The fact that the trial judge believed implicitly in the truthfulness of Nagarachnam and Ramasamy does not preclude closer scrutiny of their evidence and this we have done.

[37] This court is of the view that SP1 who was time and time again inconsistent in his testimony during the trial, shed doubt on the veracity of events which took place on the said day. SP1 was the sole eyewitness for the prosecution who was present at the time of arrest and the seizure of the knife as the remaining two other police officers who were also present at the scene were not called to testify. Therefore, SP1's evidence had to withstand the test of credibility alone without being supported by any other witness.

[38] From perusal the notes of evidence during SP1's cross-examination, this court is of the opinion that the questions put by the defence to SP1 was rather simple and straightforward. Even after the defence counsel had repeated the question, SP1 agreed that the sling bag containing the knife was found on the roof and was contained in the bag worn by the appellant. This court is also of the view that the justification offered by SP1 during re-examination on the issue of where the bag was found was of no avail as he could only say that he was confused and after recalling back the incident, he was certain the sling bag was worn by the appellant. When a witness shows inconsistencies in his evidence and keeps altering the version of events while testifying, the testimony of the witness must be scrutinized with great care and caution. A witness could not without plausible reason or justification, make amends to his earlier testimony as he wishes. If a witness is still deemed to be credible, as it was found by the learned SCJ in this case, and is allowed to change his testimony according to his whims and likings, then there would be no purpose for cross-examination to be conducted in the first place to test or challenge the veracity. In the Indian authority of *Bhojraj v Sita Ram & Ors* AIR 1936 PC 60, the Bombay High Court had this to say on the test for either accepting or declining the evidence of a witness:

> The real tests are: how consistent the story is with itself, how it stands the test of cross-examination and how far it fits in with the rest of the evidence and the circumstances of the case.

[39] In *Khoon Chye Hin v Public Prosecutor* [1961] 1 MLJ 105b; [1961] 1 LNS 41 it was ruled: A

> In our view this is wrong and calculated to mislead a jury. If a witness demonstrably tells lies on one or two points then it is clear that he is not a reliable witness and as a matter of prudence the rest of his evidence must be scrutinised with great care and indeed with suspicion. B

[40] A case on point with the case before this court is the judgment of the Federal Court in *Gunalan a/l Ramachandran & Ors v Public Prosecutor* [2006] 2 MLJ 197; [2006] 1 CLJ 857 where it was decided: C

> [16] The second issue raised in this appeal is the manner in which the learned trial judge dealt with the discrepancies in the testimonies of SP4 and SP6, as to what they saw the first accused was doing when they entered the room. What need to be considered is whether the discrepancies relate to material aspects of the case or otherwise. As stated in *Sarkar on Evidence* (15th Ed) p 112: D
>
> > Minor discrepancies are possible even in the version of truthful witnesses and such minor discrepancies only add to the truthfulness of their evidence (*Sidhan v State of Kerala* 1986 CriLJ 470, 473 (Ker)). But discrepancies in the statements of witnesses on material points should not be lightly passed over, as they seriously affect the value of their testimony (*Brij Lal v Kunwar* 36 A 187; 18 CWN 649; A 1914 PC 38). The main thing to be seen is whether the inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of the incongruities obtaining in the evidence. In the latter, however no such benefit may be available to it (*Krishna Pillai Sree Kumar v State of Kerala A* [1981] SC 1237, 1239; 1981 Cri LJ 734). E F
>
> [17] SP4 in his evidence in chief said he saw the first accused throwing the heat sealer on to the floor. Contrary to this, SP6 who followed SP4 closely from behind when entering the room stated in chief that he saw the first accused was in the course of putting powder into a small packet. The learned trial judge dismissed this as minor discrepancy which he said is expected of any witness and this goes to strengthen the point that they were not fabricating evidence, they were telling the truth. To him what is important was whether the things containing the drug were in their possession at the material time. However, he went on to say that between the two he would prefer the evidence of SP4, being the first police officer to have entered the room. In this regard I am in agreement with Abdul Aziz JCA that the discrepancy here is far from being trivial as it pertains to an activity which the prosecution relied on in order to prove knowledge of the drugs in order to establish possession. This discrepancy has to be considered against the evidence of the accused that when SP4 and SP6 entered the room the first and third accused were in a standing position. This gives rise to serious doubt on the accuracy of the evidence of SP4 and SP6, that when they entered the room the first and third accused were sitting down cross-legged facing the drug. If their attention was in fact focused on what the two accused were doing at the material time, as they claimed, G H I

then they could not be seeing two different activities. And it is all the more telling when no empty plastic packet was ever produced in evidence.

[18] In the circumstances, I agree with the submissions of counsel for the accused that the defence had succeeded to raise a reasonable doubt in the prosecution case that when SP4 and SP6 entered the room the first and third accused were sitting cross-legged on the floor facing the drug. The question is where the drug was in fact recovered by the police, bearing in mind the defence evidence that some were recovered in the room and some in the lounge. This leads to the question whether the accused in fact had exclusive custody and control over the drug. In considering this we to have to take into account the fact that no evidence was adduced by the prosecution as to who were the actual occupiers of the house. The accused in their defence maintained that Balan, Naga and Suresh were the occupiers of the house. They further said that the house is frequented by others who went there to pass their time watching television or gambling. They all had free access to the room.

[41] Likewise in this case, the matter pertaining to the time SP1 had actually arrived at the said house or whether SP1 had actually seen the appellant leaving the said house may in a way be brushed off as a minor inconsistency that does not relate directly to the root of the case, the inconsistency on where the sling bag containing the knife was actually found by SP1 was not trivial in nature and goes to the root of the entire case as the prosecution had relied on this fact in order to prove possession of the offensive weapon being the knife on the part of the appellant (see *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; [1956] 1 LNS 17).

[42] A witness who tells the truth would be tenacious and persistent on what transpired or what he had seen and he would not vary his testimony as he desires, but rather offer a plausible, reasonable and sensible explanation on the variation. Being doubtful of this fact upon viewing SP1's testimony with great caution this court is of the opinion that the prosecution had failed to prove the element of possession as the defence had indeed managed to cast reasonable doubt on the veracity on where the sling bag was actually found on that very day.

THE POSSESSION OR CONTROL OF THE OFFENSIVE WEAPON IS THAT AT A PUBLIC ROAD OR PUBLIC PLACE

[43] The main argument during the trial, as well as this appeal revolved around the third element, that the possession of the said knife by the appellant was at a public place.

[44] Section 6(1) of Act 357 requires an accused to carry, be in possession or be in control of an offensive weapon at either a public road or a public place. In this case, the charge by the prosecution pertains specifically to a public place.

[45] During the trial it was clear that the photographs tendered did not include the place where the appellant was said to be in possession of the knife and no sketch plan was tendered by the prosecution as well. SP2, who was the investigating officer testified that no photographs were taken to show the place where the appellant was apprehended and where the knife was found to be in the possession of the appellant. The explanation given by SP2 was that she was investigating a house breaking case and therefore only instructed the photographer to capture photographs at the front and inside of the said house. It is also evident from the timeline that SP2 had arrived at the said house and instructed the photographs to be taken before she received SP1's police report or had any knowledge on the arrest as well as the seizure of the knife from the appellant. SP2 never revisited the said house upon receiving SP1's police report.

[46] The learned SCJ was of the opinion that the court ought to take judicial notice of the location of the house and the roads in the housing area. In her grounds of judgment, it was stated:

> [24] Dalam kes ini, pihak pendakwaan tidak mengemukakan sebarang gambar untuk menunjukkan kawasan belakang rumah di mana senjata berbahaya tersebut dirampas. Gambar-gambar (P1A-O) yang dikemukakan oleh pihak pendakwaan adalah tertumpu kepada ruang di dalam rumah tempat kejadian. Namun demikian, *mahkamah mengambil notis kehakiman berkenaan kedudukan rumah dan jalan di kawasan taman perumahan.* Mahkamah mendapati kegagalan pihak pendakwaan untuk menunjukkan gambar tempat OKT ditangkap dan senjata berbahaya ditemui tidak menjejaskan kes pendakwaan. (Emphasis added.)

[47] In *Commonwealth Shipping Representative v Peninsular and Oriental Branch Service* [1923] AC 191, Lord Sumner defined judicial notice as:

> Judicial notice refers to facts, which a judge can be called upon to receive and to act upon, either from his general knowledge of them, or from inquiries to be made by himself for his own information from sources to which it is proper for him to refer.

[48] Section 56 of the Evidence Act 1950 prescribes that facts in which the court takes judicial notice does not have to be proved. The provision reads:

> 56 *Fact judicially noticeable need not be proved*
>
> No fact of which the court will take judicial notice need be proved.

[49] In the case of *Kordial Kor d/o Kundang Singh v EC Controlled Demolition Sdn Bhd & Ors* [2002] 7 MLJ 386, Abdul Malik Ishak J stated:

> In regard to the judicial notice which I alluded to earlier, I have this to say. Sections 56 and 57 of the Evidence Act 1950 deal specifically with judicial notice. In *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 at

p 31, Syed Agil Barakbah SCJ had this to say on the subject of judicial notice:

> *Now the general rule is that all facts in issue and relevant facts must be proved by evidence. There are, however, two classes of facts which need not be proved, viz: (a) facts judicially noticed; and (b) facts admitted. The exceptions are dealt with by* ss 56, 57 and 58 of the Evidence Act 1950 under the title 'Facts which need not be proved'.

Abdul Hamid Omar J (who later rose as the Lord President of the Supreme Court) aptly said in *Lee Chow Meng v Public Prosecutor* [1976] 1 MLJ 287 at p 288:

> Courts have even taken judicial notice that streets in London are crowded and dangerous — (*Dennis v AJ White & Co* [1916] 2 KB 1, at p 6); and of worldwide economic depression (*Ram Tarak v Selgranm* [1944] 7 AC 153).

It may be argued that the general knowledge which I had acquired whilst serving in the Johor Bahru High Court cannot be used as a leverage to give rise to a judicial notice of a Singapore citizen having the same digital number in both the NRJC and the passport. By way of an answer thereto, reference should be made to the case of *Lim Kong v Public Prosecutor* [1962] 1 MLJ 195 at p 197 where Adams J succinctly said:

> Mr Marshall also objected to the President drawing on his own knowledge concerning fresh elephant droppings and the prevalence of wild boar and deer on this stretch of road. A president in the course of his duties is bound to travel up and down the length and breadth of his circuit and he obviously cannot keep his eyes shut ... The president who travels this road frequently can use the general information of his own eyes of the physical features of an area well known to him for general purposes.

and likewise here what had transpired during court proceedings in High Court Johor Bahru cannot be kept away from my 'own eyes' to see and acknowledge because the facts were sufficiently notorious that it was proper to assume its existence without proof. The speech of Lord Sumner in the case of *Commonwealth & Co v Peninsular & Co* (1923) App Cas 191 at p 210 should also be reproduced as it would surely be an eye opener. There His Lordship said:

> To require that a judge should affect a cloistered aloofness from facts that every other man in court is fully aware of, and should insist on having proof on oath of what as a man of the world he knows already better than any witness can tell him, is a rule which may easily become pedantic and futile.

Two Latin terms, quite attractive by themselves, immediately come to mind. The first would be *lex non requirit verificare quod apparel curiae* (the law does not require proof of that which is apparent to the court). The secord would be *quod constat curiae opere testium non indiget* (that which is established to the knowledge of the court does not require the aid of witnesses). In *Roberts & Ruthven v Hall* (1912) 106 LT 769, Cozens-Hardy MR was of the view that an arbitrator was entitled to act on his general knowledge pertaining to the conditions of the labour market then prevailing particularly in regard to the rate of wages for the type of work that could be earned in that locality. Adopting the same line of approach, Scrutton LJ in *Pearl v Bolcknow, Vaughn & Co* [1925] 1 KB 399, at p 419 aptly said:

> The county court judge, acting as an arbitrator and sitting in a district where he is very familiar with labour conditions, may use his own knowledge as to the probable wages, probable employment for like work, and conditions of labour … it would be a denial of justice to require these facts to be continually proved.

As opposed to general knowledge, there is also personal knowledge which a judge is entitled to rely upon. This is amply demonstrated in the case of *R v Feild JJ; Ex parte White* (1895) 64 LJMC 158 where a grocer was charged for selling adulterated cocoa. The issue that the court had to consider was whether the cocoa must necessarily contain some foreign ingredients. It transpired that Admiral Feild and the chairman of the petty sessions together with two other justices had used their personal knowledge which they had acquired while they were in the navy to decide the issue. Wills J, a distinguished mountaineer himself, agreed with this line of approach and at p 160 of the report this was what he said:

> In the nature of things, no one in determining a case of this kind, can discard his own particular knowledge of a subject of this kind. I might as well be asked to decide a question as to the sufficiency of an Alpine rope without bringing my personal knowledge into play.

Judges must be bold and be forward-looking. Judicial notice premised on either general knowledge or personal knowledge must be acknowledged as the surest way to expedite the process of a trial. Be that as it may, in the context of the present case, I was shown the Singapore passport of the plaintiff in chambers and what I saw with my own eyes would be sufficient to conclude that the plaintiff is indeed a Singapore citizen. This was my judgment and I so hold accordingly.

In answer to the argument in regard to the slip rule, Mr T Gunaseelan referred me to O 20 r 11 of the RHC and he submitted that it relates to clerical mistakes in judgments or orders or errors arising therein. To be exact, I shall now reproduce O 20 r 11 of the RHC and it is worded in this way:

> Clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court by summons without an appeal.

As I see it, this rule applies in cases where there is a clerical mistake in a judgment or order or an error arising from an accidental slip or omission. Of course, apart from this, the court has an inherent power to vary its own orders in order to give effect to its meaning and to make its meaning as plain as possible (*Thynne v Thynne* [1955] P 272 (CA); *Pearlman (Veneers) SA (Pty) v Bernhard Bartels* [1954] 1 WLR 1457; [1954] 3 All ER 659 (CA); and *Milson v Carter* [1893] AC 640). It would not be wrong to say that O 20 r 11 of the RHC does not apply to an affidavit and that being the case, this court has no right to invoke the 'slip rule' in favour of the plaintiff. At any rate, there was no 'slip' at all because the plaintiff is in fact a Singapore citizen as can be seen from her passport number. (Emphasis added.)

[50] In line with this, s 114 of the Evidence Act 1950 states:

114 *Court may presume existence of certain fact*

A The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.

B **[51]** The question which arises now is whether it was right for the learned SCJ to invoke judicial notice, that the place where the appellant was apprehended and the said knife was discovered was indeed a public place?

C **[52]** In *Tenaga Nasional Bhd v Teobros Development Sdn Bhd* [2008] 6 MLJ 391; [2008] 1 LNS 395, the Court of Appeal had discussed judicial notice in regards to geographical matter where it was ruled:

[24] It is said that through judicial notice, a judge accepts an adjudicative fact (see John W Strong, *McCormick on Evidence*, p 328 at 491) or a legislative fact without
D requiring proof. This is usually done for purposes of convenience. The court would certainly take judicial notice of a fact where it is desirable that the evidence in relation to it should not be called. This principle would usually be applied where a particular fact is so notorious that to require evidence to prove it would be an inconvenient as well as an unnecessary waste of time and resources. Facts may be
E judicially noticed where 'no person can raise a question' as to their truth (*The King v Luffe* [1807] 8 East 193 at p 207). Thus, judicial notice can be taken of the fact that two weeks is too short a gestation period for human beings. *Judicial notice too will be taken of geographical matters.* For instance, that the universal practice of the Ordinance Survey Office of representing the centre of a hedge by a line on a map
F should be acceptable and this is reflected in the case of *Davey v Harrow Corporation* [1958] 1 QB 60. In *Lethia M Coover v DE Davenport* [1870] 48 Tenn 368; WL 2672 (Tenn) 7, the court took judicial notice of divisions of counties in Tennessee. In *Sublette Exchange Bank, Appellee, v Martin J Fitzgerald, Appellant*, et al 168 Ill App 240; 1912 WL 2020 (Ill App 2 Dist), it was held that 'the court will take
G judicial notice of the geographical features of this and other states and countries, so far as the same may be fairly presumed to be within the general knowledge of persons of ordinary intelligence living here'. In *Patterson v Van Wiel* [1977] 570 P 2d 931; 936 (NM App 1977), the court held that 'common knowledge includes matters of learning, experience, history, and facts of which judicial notice may be taken'.

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[25] *Geographical location of relevant places and the distance between them are among the things that the court may take judicial notice of. And the court too may take judicial notice of locations shown in a government issued map (Malaysia Building Society Bhd v Univein Sdn Bhd* [2003] 5 MLJ 394*). Section 57 of the Evidence Act 1950 (Act 56)*
I *is not exhaustive and it 'does not prohibit the courts from taking judicial notice of other facts not mentioned therein' (per Syed Agil Barakbah SCJ in Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30 at p 32; [1985] 1 LNS 122). In America, in the case of *Fine Foods Inc v Dahlin* [1986] 523 A 2d 1228, at p 1231 (Vt 1986), the court held that, 'The distance from the Old Newfane Inn to plaintiffs' restaurant in Brattleboro is a fact which the trial court could accurately

determine from unquestionable sources, and, thus, judicial notices was within its discretion'.

[26] John W Strong, *McCormick on Evidence*, (5th Ed) 1999 at p 496 stated that 'after a number of courts take judicial notice of a principle, subsequent courts begin to dispense with the production of these materials and to take judicial notice of the principle as a matter of law established by precedent'. In Malaysia, it is known to the members of the public that accurate maps of the states within Malaysia issued by the National Mapping Directorate are openly available for sale to the public at the Pejabat Jabatan Ukur dan Pemetaan, that is, the office of the Survey and Mapping Department. Starting a cue, I now take judicial notice of the availability of the accurate maps of the states within Malaysia to the members of the public and before me is an accurate map of Malacca entitled 'Semenanjung Malaysia, Melaka'. (Emphasis added.)

[53] In *Lim Kong v Public Prosecutor* [1962] 1 MLJ 195; [1962] 1 LNS 89, Adams J ruled that the court ought to use the general information of the physical features of an area well known to the court for general purposes. The related passage of the judgment reads:

A President in the course of his duties is bound to travel up and down the length and breadth of his circuit and he obviously cannot keep his eyes shut. As Evans J said in *Lee Lip Ngee v Crown Counsel* [1947] 1 MLJ 68; [1946] 1 LNS 10:

> Section 57(i) of the Evidence Enactment does not contain an exhaustive list of matters subject to judicial notice, and sub-s (2) thereof gives the court a wide power of judicially informing itself, which was in practice been widely used. I fell no doubt that a port's tide tables worked out and published for general information might quite properly be consulted. So too the judge might be expected to have a general knowledge of the navigation of a port in his area just as he would be expected to have a general knowledge of the means of communication.

The President who travels this road frequently can use the general information of his own eyes of the physical features of an area well known to him for general purposes. There is evidence on the record that the road between the ninth milestone to Jemaluang is uninhabited and also that it was jungle ... (Emphasis added.)

[54] From the passage of the judgment above it is clear that judicial notice on geographical matters or to put it in simpler terms surrounding features can be taken which are within the general knowledge of persons of ordinary. It must not be assumed that the court is unable to see and realize matters which are ordinary in nature and which are within the common knowledge of any ordinary person.

[55] Relating this matter to the issue before this court which is, could the learned SCJ have taken judicial notice on location of the said house and the roads in the housing area? This court's view is in the negative.

[56] Judicial notice on surroundings should only be taken which are of general in nature and which would be in the common knowledge of any ordinary person. The trial court should not import evidence, that the place was indeed a public place as what was located behind house number 120, Jalan Bagan Lalang 1 was not stated or explained in the course of the trial.

[57] This court refers to the classic Australian case of *Holland v Jones* [1917] HCA 26 where it was stated that judicial notice of 'particular' facts, even the judge's own personal knowledge is not to be imported into a trial. The Australian High Court's judgment read:

> The only guiding principle apart from Statute as to judicial notice which emerges from the various recorded cases, appears to be that wherever a fact is so generally known that every ordinary person may be reasonably presumed to be aware of it, the court 'notices' it, either simpliciter if it is at once satisfied of the fact without more, or after such information or investigation as it considers reliable and necessary in order to eliminate any reasonable doubt.
>
> The basic essential is that the fact is to be of a class that is so generally known as to give rise to the presumption that all persons are aware of it. This excludes from the operation of judicial notice what are not 'general' but 'particular' facts. As to 'particular' facts, even the judge's own personal knowledge is not to be imported into the case; *Hurpurshad v Shea Dyal* and *Me Pthun Behee v Busheer Khan*. To import knowledge of particular fact in issue would be to import evidence in the strict sense regarding a matter as to which the Court is supposed to have no knowledge whatever of its own.

[58] In *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377, Shankar J ruled:

> In this case the learned President imported into the case his own knowledge of particular facts relating to the cost of a Chinese funeral and a coffin. He could not without giving evidence himself as a witness have brought such knowledge into the case and what was done was not permissible under the law.

[59] The learned SCJ had indeed imported her own knowledge of the location of the incident when he concluded that she had taken judicial notice on the location of house number 120, Jalan Bagan Lalang, Butterworth and the roads in the housing area. It would also be too farfetched to state that what was behind or surrounding house number 120 Jalan Bagan Lalang, Butterworth was a public place as it is something particular in nature and would not be in the common knowledge of any ordinary person.

[60] On another note, upon examining the records of appeal in particular the notes of evidence as well as the witness statements, the prosecution witnesses which compromised of only SP1 and SP2 had only stated that the arrest was conducted at the back of the said house or the term which was frequently used through the trial 'di belakang rumah' and 'di luar pagar'.

[61] Be that as it may, the crucial question which is left unanswered by the prosecution is that, where was the place which is said to be a 'public place' that the offensive weapon was found to be in the possession of the appellant? To say it was 'di belakang rumah' or 'diluar pagar' does not suffice as it was not explained what was the place exactly behind the said house or over the fence of the said house? Was it another house, a parking lot, a road, a garden or anything else for that matter? The court is left guessing on this issue on where was the place that is said to constitute a 'public place'.

[62] This court does not see the hinderance that was faced by the prosecution witnesses in explaining this during the trial, on where was the place and that it was indeed a public place. Even if the photographs were not taken, the investigating officer ought to have made a sketch plan for it to be explained. A site visit or *locus in quo* could have been done to clear the matter at hand rather than basing this on guesswork and assumptions. SP1 could have also been asked to explain clearly where was the place where the appellant was found to be in possession of the knife. Leaving this matter unexplained, does not allow the court to unjustly assume that it was indeed a public place as the possession of the said knife would only constitute an offence if it was to be possessed in a public place.

CONCLUSION AND DECISION

[63] By failing to prove the elements of the charge, the prosecution fails to prove even a prima facie case against the appellant. Therefore, there is no necessity to even consider the defence of the appellant as he should not have even been called to enter into his defence.

[64] Upon perusal of the records of appeal and the written submissions by both the appellant and respondent as well as hearing the oral arguments, this court allows the appeal by the appellant. The conviction and sentence by the Butterworth Sessions Court is set aside. The appellant is therefore acquitted and discharged from the charge.

Appeal allowed, conviction and sentence set aside.

Reported by Izzat Fauzan